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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 713

ROBERT L. STRAUSS,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT L. STRAUSS, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on the 21st day of July, 1966.

OPINIONS BELOW

The opinion of the court below now sought to be reviewed (Appendix A) is reported at 363 F.2d 366. The opinion of the court below affirming the original conviction (Appendix B) is reported at 311 F.2d 926, certiorari denied, 373 U.S. 910. The opinion of the court

below on the first motion for new trial by reason of newly discovered evidence (Appendix C) is reported at 337 F.2d 853.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1966 (Appendix D). A timely petition for rehearing was denied on September 22, 1966 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Petitioner was convicted of conspiracy to conceal assets in contemplation of bankruptcy. That conviction was sustained over petitioner's contention that there was insufficient evidence to prove his connection with the conspiracy, on the strength of petitioner's alleged endorsement of three certain checks, together with testimony that the cash proceeds of another check had been given to petitioner.

Thereafter, the petitioner was indicted for income tax evasion in respect to funds representing the proceeds of those same checks. In prepartion for this trial, petitioner's counsel learned from a recognized handwriting expert that petitioner's endorsement on the checks was forged.

Thereupon, petitioner filed an extraordinary motion for new trial alleging the foregoing and, also, showing through documents that he had been in South America at the time of the alleged cash payment. The forgeries were

proved at a special hearing set by the trial court, and the government made no effort to refute this proof. Meanwhile, the petitioner had been acquitted of tax evasion with respect to the proceeds of these checks.

The trial court denied the extraordinary motion for new trial, denial that was affirmed on the ground, among others, that petitioner did not prove that he had not authorized the forgeries.

The question presented is whether, under the doctrine of *Mesarosh v. United States*, 352 U.S. 1, a conviction may be allowed to stand where it has been demonstrated, without contradiction, that it rested upon forged documentary evidence.

STATUTES AND RULES INVOLVED

The statutes and rules involved in the case are set out in Appendix F, App. 20-22.

STATEMENT

A. Background of the Conviction.

Petitioner was convicted in the United States District Court for the Southern District of Florida on one count of conspiring to conceal assets in contemplation of bankruptcy in violation of 18 U.S.C. §371. (Supp.R. 13, 33, 37)[1]

[1]As used in this Petition for Certiorari, "R" refers to the transcript of record in this cause, as certified by the clerk of the court below; and "Supp.R" refers to the pages of the *Supplemental Record*, namely, the transcript of proceedings on the original trial.

The evidence upon which the petitioner was convicted consisted largely of a series of checks, some of which were payable to the petitioner, written by the bankrupt "Harold Corporation", together with an agreement which purported to make a certain "Jeri Bolton" bank account, in reality, the property of the petitioner and one Ray Goodman, a co-defendant.

Throughout the trial the petitioner maintained the position that the evidence was insufficient, either to make out a conspiracy or to connect him with it. He did not testify.

The prosecution introduced evidence by a handwriting expert as to petitioner's alleged endorsement on one of the checks introduced (Supp.R. 466, Original Exhibit 51).

The Court of Appeals affirmed the conviction. *Strauss v. United States*, 311 F.2d 926 (CA 5, 1963) certiorari denied 373 U.S. 910. The court held that proof of the existence of the conspiracy shifted to the petitioner the burden of proof of his disassociation from it.[2]

The court further held that there was sufficient evidence to establish a conspiracy, because the jury was entitled to believe that the petitioner had received checks

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[2]"Second, the indictment alleges a conspiracy from on or about January 1, 1956, continuously to about April 15, 1958, and appellant cannot narrow the period of the conspiracy, as he attempted to do, by relating this count to substantive counts 6 and 7 against Goodman. The period of the conspiracy was a matter for trial and for proof and *the burden was on appellant to show his disassociation from the conspiracy, once he had been connected, as he was, to it.* [Citing cases]" 311 F.2d 926, at 931. (Emphasis supplied)

drawn by "Jeri Bolton" on the account of the bankrupt Harold Corporation in the Mercantile Bank of Miami Beach, in the respective amounts of $16,000 and $7,500 and a check in the amount of $25,500 drawn on the Miami Beach First National Bank; that these checks bore the endorsement of the petitioner and that the funds were received by him. The Court of Appeals also observed that the evidence entitled the jury to believe that the petitioner received the proceeds of a check drawn on the account of the Harold Corporation in the sum of $15,000 which was cashed by one Jack Lowe and given to the petitioner on a street corner outside the bank (See 311 F.2d 926, at 930, App. B, App. 11).

After his conviction was affirmed, petitioner moved for a new trial on the ground that he had discovered new evidence, not available at the trial, which would show that he had disassociated himself from the affairs of the Harold Corporation in March of 1957. This evidence consisted of the testimony of petitioner's co-defendant at the original trial (who did not testify), that petitioner had diassociated himself from the affairs of the Harold Corporation on that date.

The trial court denied this motion for new trial on the grounds that there was "other evidence" tending to show petitioner's continued association with that corporation, and the Court of Appeals affirmed. *Strauss v. United States*, 337 F.2d 853.

B. **Discovery of Forgeries.**

Meanwhile, petitioner was indicted for income tax evasion. The deficiency as to one of the years resulted

from the alleged receipt of the same funds in respect to which the petitioner had been convicted in the present case.

During the preparation for that trial, petitioner's counsel discovered and assembled the evidence upon which the present extraordinary motion for new trial, now in question, was based.

At the original trial of this case, the prosecution introduced into evidence three certain checks which purportedly bore petitioner's endorsement:

Motion Exhibit	Original Exhibit	Date	Payee	Endorsements	Amount
11	51	11/11/56	Robert Strauss	Robert L. Strauss and Ray Goodman	$25,500
12	34	12/10/56	Robert L. Strauss	Robert L. Strauss	$16,000
13	35	12/19/56	Robert Strauss	Robert L. Strauss	$ 7,500

The original opinion of the Court of Appeals in this case indicates that the evidence against the petitioner was found to be sufficient, largely because of these checks:

> "* * * There was evidence that Jeri Bolton drew checks on the account of the Harold Corporation in the Mercantile Bank of Miami in the amount of $16,000 and $7,500, payable to appellant, and these were purportedly endorsed by him. There was another check drawn on the Harold Corporation account in the Miami Beach First National Bank to appellant, purportedly endorsed by appellant and Goodman, in the amount of $25,500."

* * *

"There was no evidence refuting any inference that these funds were transferred improperly to appellant. * * * " 311 F.2d 926, at 930. (App. A).

What petitioner's counsel had discovered, however, and what was promptly put before the trial court in affidavit form, was that the petitioner's alleged endorsement on *each* of these three checks—the checks which the Court of Appeals had found to be the basis of petitioner's original conviction—was *forged.* (R. 122, 126-135).

It will also be observed that the other basis upon which the Court of Appeals sustained the petitioner's conviction was the testimony of Lowe that he had cashed a check and had paid $15,000 to the petitioner outside of the bank.[3]

The motion for new trial also contained documentary evidence (R. 139-148) proving that the petitioner had been continuously out of the country at the only times when Lowe would have had any such funds to pay to the petitioner.

C. **Proof of the Forgeries.**

When the foregoing motion was filed, the trial court held two hearings thereon (R. 1, 160-161) at which testimony was taken. At the hearings, the petitioner presented the testimony of one Charles A. Appel, Jr., who was the

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[3]"Lowe, at one time president of the Harold Corporation, testified regarding a series of checks made payable to Jeri Bolton by the corporation which he personally cashed and gave the proceeds either to Goodman or appellant. The proceeds of one check in the amount of $15,000 was given to appellant outside the bank. * * * " 311 F.2d 926, at 930.

founder of the FBI handwriting laboratory and generally acknowledged to be the dean of questioned documents examiners in the United States (R. 48, 136).

This witness testified without equivocation that the supposed endorsement of the petitioner on each of the three checks mentioned by the Court of Appeals in its original opinion was forged. (R. 62-63, 70-73)[4]

[4] "THE WITNESS: Well, I found in this endorsement of Defendant's No. 11, irregularity, in the line such as the lifting of the pen or the turning of a line in the (58) wrong direction, which, of course, also produced slight differences in designs which I believe to have been caused by inadvertent motion habits of the forger in attempting to imitate the signature of Robert Strauss in endorsing this check. The signature is more vertical. The downward extension of the lines were more regular and despite the appearance of shapes, which in Mr. Strauss' examples, are produced by extremely speedy pen movement, these appearances on the check in Defendant's Exhibit 11, must be false, because, as I say, there are pen lifts and the lines are, at time more uniform in width, showing a lack of genuine variations of pressure. Certainly not the pressure of variations which appear in examples of Mr. Strauss.

So, for these reasons it was my conclusion that the signature of endorsement of Robert Strauss on Defendant's Exhibit No. 11, was not written by the writer of this name on Government's 1, 30-L, 30-M, was written by someone else in imitation of some genuine model." (R 62-63)

* * *

"Q Well then, directing your attention now to Exhibit No. 12, you have reached the conclusion with this—is it $16,000 check that you reached the conclusion of whether or not the signature there is that of Mr. Strauss or not?"

"A Yes, I did."

"Q What is that conclusion?"

"A It was not written by Robert Strauss the writer of the name on Government's Exhibit 1, 30-L, and 30-M."

* * *

"Now, have you made a determination, Mr. Appel, whether or not Mr. Strauss endorsed the reverse side of Exhibit 13—will you make the comparison with the income tax case, Government's Exhibit No. 38-A?

"A Yes, I did. I decided that this also is a forgery or imitation of the genuine signature of Mr. Strauss and was executed by somebody else. * * *" (R 70-71)

Although the prosecution had months of notice and had long had copies of the reports of the petitioner's handwriting expert, it offered no evidence to contradict this proof of forgery.

D. Refutation of the Testimony of Jack Lowe.

As noted, the Court of Appeals also bottomed its original affirmance upon testimony by the one time president of the Harold Corporation, Jack Lowe, that he had cashed a check and had given the proceeds to the petitioner on the street outside the bank (351 F.2d 926, 930; Appendix B, App. 11).

Lowe had testified (Supp.R. 205-260) that he had received checks from the co-defendant, Ray Goodman, had cashed a check in excess of $15,000 and had given the proceeds to the petitioner (Supp.R. 231). Testifying on the motion, this witness identified a particular check as the one he had cashed for that purpose (R. 45). However, at this hearing the petitioner's counsel demonstrated, and Lowe admitted, that this very check (Motion Exhibit 1) had been deposited in a bank account by deposit slip in the witness' own handwriting (Motion Exhibit 1) (R. 19, et seq.).

Confronted with this direct refutation, Lowe changed his position, while on the witness stand, and testified that the money came from a "series of checks" (R. 27, et seq.). However, an analysis of all checks cashed, made by the petitioner's witness, a Certified Public Accountant (R. 36-37), showed that there were no checks in an amount

in excess of $15,000, nor were there any combination of checks in any day which could have totalled $15,000.[5]

Petitioner testified in his own behalf on the hearing on the motion, and showed that he was continuously outside of the United States at the time the check-cashing by Lowe took place. His testimony was fully corroborated by unimpeachable documentary evidence (R. 141-148, 151-156).

E. Different Result at the Trial for Income Tax Evasion.

Subsequent to the filing of the present extraordinary motion for new trial, but prior to the hearing thereon, petitioner stool trial for income tax evasion. At this trial, Jack Lowe was subpoenaed but was not called as a government witness. (Income Tax Case Record, United States Court of Appeals, Case No. 22546, pp. 194-199)

The petitioner presented the testimony of his handwriting expert as to the forgeries of his endorsement on these same checks.

The jury acquitted the petitioner as to the year in which the deficiencies were based upon these checks.

Petitioner's conviction on different items, involving different tax years, is currently on appeal.

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[5]The testimony of witness Kaufman showed that from the period January 1, 1957, through September 1957, there were but thirteen (13) checks of $15,000 or above, and only two of such checks were cashed.

F. The Ruling Below.

The court below affirmed the district court's denial of petitioner's extraordinary motion for new trial (App. 1). It did so upon the basis of its finding that this evidence, if presented to the jury, would not have been likely to produce a different result; and, also, on the ground that petitioner should have taken the stand at the trial to deny the testimony against him.

The conclusively demonstrated forgery of petitioner's signature on the three incriminating checks was disposed of by the court below as follows:

> "What the appellant completely ignores here, of overlooks, is that there is no substantial evidence that Strauss's signature, even though not written by him, was a 'forgery' in the legal sense. * * * The jury might have inferred that if these three checks had been endorsed by someone other than Strauss, then it was with his consent or had been ratified by him."

The Court of Appeals further held that *Mesarosh v. United States*, 352 U.S. 1, was distinguishable because here there was no concession by the prosecution.

REASONS FOR GRANTING THE WRIT

In respect to the two most vital features of this case, petitioner, the prosecution, and the court below are in accord:

1) The three checks, allegedly endorsed by

petitioner represent the key evidence upon which his conviction depends.

2) It is now known that petitioner's signature on the checks was "not written by him".

The first feature is established by the original opinion of the Court of Appeals (App. B, App. 11) as well as by the opinion affirming the denial of this extraordinary motion for new trial. The second feature is established by the unequivocal testimony of a witness of the highest possible expertise by the fact that the prosecution, with unlimited time and resources, made no attempt to refute the testimony of petitioner's expert, and by the tacit assumption of the court below in its opinion.

Here the petitioner stands convicted because of documents—canceled checks—which convinced a jury that certain monies had passed through his hands in furtherance of a conspiracy, even though proof in a second prosecution for tax evasion established that the endorsements purporting to represent his receipt of those funds were not, in fact, made by him.

We submit that this case raises vitally important questions concerning the extent to which a conviction may be allowed to stand when it is shown to rest upon such tainted evidence.

Succinctly stated, the decision below in this case is in conflict with applicable decisions of this Court, primarily *Mesarosh v. United States*, 352 U.S. 1. There, it was shown that a witness upon whose testimony a conviction depended, had given false testimony *in other pro-*

ceedings of a similar nature, as was there conceded by the Solicitor General. However, there was no evidence that the witness had committed perjury in the particular proceeding before the court, and the Solicitor General specifically refused to concede that he had. Nevertheless, this Court went on to point out that, where there was a "taint" on the proceedings because of the perjured testimony, the interests of justice demanded that a new trial be granted:

> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interest of justice call for a reversal of the judgments below with direction to grant petitioners a new trial." 352 U.S. 1, 14.

The legal question presented by this petition concerns the scope of the *Mesarosh* doctrine. To what extent must the interest of justice in not convicting persons on forged, perjured, or otherwise tainted evidence, yield to the essentially formalistic considerations inherent in the rules governing motions for new trials?

The court below attempted to distinguish *Mesarosh* because of this Court's notation of "a concession by the Solicitor General that a government witness was dishonest".

We think that, for four reasons, the basic question presented here cannot depend upon what the prosecution may do:

1) An individual's right to liberty and a fair trial cannot depend upon whether or not the

executive concedes the soundness of his complaints. Under the basic constitutional scheme of separation of powers, those rights always rest upon judicial determinations.

2) While this Court will often accept a confession of error by the Solicitor General, it has never been bound by the confession or non-confession by that office. See, e.g., *Casey v. United States*, 343 U.S. 808; *Orloff v. Willoughby*, 345 U.S. 83, 87.

3) As noted, by failing to offer any testimony whatsoever to counter the petitioner's newly discovered evidence that his signatures were forged[6], the prosecution is tacitly admitting that the signatures were, in fact, forgeries.

4) The fact that Lowe was subpoenaed but not used in the tax case, a circumstance disclosed by the record in that case, is a convincing demonstration that the prosecution itself lacked confidence in his veracity.

The court below, in its opinion, frankly admitted that inconsistencies were shown in Lowe's testimony, but held that "no case of 'perjury' could be made against Jack Lowe". In so holding, it overlooked, and held contrary to, the principle enunciated by this Court in *Napue v. Illinois*, 360 U.S. 264. There it was held that a State may not suppress or use false testimony even when such matters go only to the credibility of the witness.

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[6]or " * * * not written by him * * *" as characterized by the Court of Appeals (App. A, App. 4).

"The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. * * * " 360 U.S. 264, at 269

Surely the United States in its own criminal prosecutions cannot adopt practices that this Court has forbidden to the States.

We think, however, that the most compelling reason for granting this writ is the holding below that the discovery and proof of forgery shifted the burden to the victim of that forgery, to prove that he did not specifically authorize it.

Here, under the opinion below, the petitioner stands convicted because of funds received by him, the only evidence of whose receipt is his endorsement on a check. When it is shown beyond argument that the endorsement was not written by him, the court below suggests that petitioner might have authorized someone else to sign his name—although there is not one scintilla of evidence in this record to that effect.

Indeed, the consistent position taken by the petitioner since the discovery of this forgery, both upon this motion

(R. 102-103 et seq.) and on the income tax trial, are sufficient to negate any such possibility.

This holding carries ugly and ominous overtones of historic injustices, for example, the infamous Dreyfus case[7], and accordingly involves such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

We think this is a classic case for the application of the *Mesarosh* doctrine. In *Mesarosh*, there was admitted evidence of perjury by the key witness in other proceedings. Here, there is an unarguable showing that the key evidence *in the same proceeding* was forged and that a key witness was, at the very least, wrong in significant items.

We submit that, on a proper application of the *Mesarosh* doctrine, this case should be remanded to the district court for a specific finding as to whether or not the checks upon which the petitioner was convicted are forgeries. If they are found to be such, then that court must order a new trial.

CONCLUSION

Petitioner stands convicted by reason of documents now proved to have been forged, and whose forgery is not now contested. Such a result necessarily impairs the in-

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[7]In 1899, at Rennes, upon a retrial of his court-martial conviction, Alfred Dreyfus offered conclusive proof that he had not written the incriminating *bordereau*. The War Office argued that even if he had not written it, he must have caused it to be written—and Dreyfus was again convicted. See Halasz, *Captain Dreyfus* (N.Y. 1955), 227

tegrity of the judicial process. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

OPINION BELOW

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22897

ROBERT L. STRAUSS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 21, 1966.)

Before TUTTLE, Chief Judge, BROWN and COLEMAN, Circuit Judges.

TUTTLE, Chief Judge: This is the second attempt to re-try this case following an affirmance of the original judgment of conviction and sentence by this court, 311 F. 2d 926 (5 Cir.,) and denial of certiorari by the United States Supreme Court, 373 U.S. 910.

Strauss was convicted in the United States District Court for the Southern District of Florida for a violation of 18 U.S.C.A. §371; Conspiracy to Conceal Assets in Contemplation of Bankruptcy. Briefly stated, the nature of the conspiracy charged, and which this court held was proved sufficiently to warrant submission to the jury, was that the appellant, together with Goodman and appellant's wife and one

Jeri Bolton, would set up a corporation to acquire a leasehold interest in the Cadillac Hotel in Miami Beach, Florida, and that the corporation thus set up would borrow substantial sums of money, ostensibly for corporate purposes and would sell its stock and debentures, also ostensibly for corporate purposes, but with the true purpose, according to the indictment, of making available funds which would then be withdrawn by the appellant and Goodman, with the concurrence or assistance of the other conspirators, thus denuding the corporation of substantial assets in contemplation of the ultimate failure and bankruptcy of the company. The company was The Harold Corporation.

Upon the affirmance of the judgment of conviction, this court determined that there was substantial evidence to support a finding by the jury that substantial amounts of the funds of the corporation had been improperly withdrawn by appellant. In commenting on such sums, the court indicated that there were three certain checks that were made payable to Strauss and ostensibly endorsed by him. The government produced an expert handwriting witness who testified that in his opinion the endorsements were those of Strauss. In addition, a witness, Jack Lowe, testified that on one occasion he had cashed a check at the instance of Goodman, being a check for $15,000 or larger, and had given the proceeds to Strauss. Lowe also testified that on another occasion he had given the proceeds of a check to Strauss on his front porch in cash. In his testimony on the original trial, Lowe did not give even an approximate date when these occurrences took place, nor did he make it clear that the $15,000 was the proceeds of a single check in that amount, or for a larger sum.

The appellant did not take the witness stand personally on the original trial. He, therefore, did not dispute the testimony by Lowe that the latter had cashed a corporation check and delivered the proceeds to him in cash. Nor did the appellant testify that the signatures on the three mentioned checks were not his signatures. No witness was called on behalf of the defendant to challenge the opinion of the government's witness to the effect that Robert Strauss actually signed the endorsements on the mentioned checks.

After the affirmance of the conviction, a motion for new trial was filed, based on the theory of newly discovered evidence. The newly discovered evidence was the assertion by Strauss that he had discovered,

after the trial, that his relations with The Harold Corporation, and Goodman and Jeri Bolton had entirely ceased in March, 1957, prior to some of the transactions testified to on the original trial. This motion for new trial was overruled by the trial court, and this court affirmed, stating that we were "unable to hold that the trial court erred in the light of the strict requirements for the granting of such extraordinary motion," *Strauss v. United States,* (5 Cir.) 337 F. 2d 853.

On December 1, 1964, appellant filed this second motion for new trial. This new motion was based on two grounds primarily. The first was that the three checks which have been mentioned above were not endorsed by Strauss but Strauss's signature had been written by someone else attempting to copy it. The second ground was that an analysis of the actual withdrawals by check of The Harold Corporation during a certain period in August, 1957, made it clear that Lowe's testimony of having given Strauss $15,000 as the proceeds of a check, was demonstrably false. The third ground was the attachment to the second motion for new trial of a purported release of Strauss executed by Goodman and Bolton on March 20, 1957.

Because of the fact that this court expressly mentioned three checks as having been introduced with the apparent signature of Robert Strauss having been used to negotiate them, we have carefully restudied the entire record on the original trial, and all of the evidence adduced, in order to determine whether, even assuming that impeaching evidence such as now presented must be considered by the trial court on a second motion for new trial on the ground of newly discovered evidence, such evidence would meet the requirement that if introduced on the first trial it would probably have caused a different result. See *Ledet v. United States,* (5 Cir.) 297 F. 2d 737.

We concur with the views expressed by the trial court in the overruling of this present motion for new trial. The court pointed out that the issue as to the genuineness of Robert Strauss's signature on the three checks was presented on the first trial. The defendant has shown no reason why he would not be aware of the falsity of the signature on these checks, totalling some $50,000, if in fact they did not bear his signature. No reason is given for his failing to attempt to prove the falsity of these signatures if such was in fact the case. So too with respect to the challenge of the testimony of Jack Lowe.

Even assuming that Lowe's testimony tendered in support of the present motion for new trial was contradictory of that given on the first trial, which would be hard to establish because of the lack of specific dates testified to by Lowe originally, no reason is assigned why the appellant would not know instantly upon hearing Lowe's original testimony that his statement that he had delivered $15,000 in cash to Strauss was not true, if, in fact, the story was not true.

As stated by the trial court, if such showing as made here could be permitted to require a new trial, "no defendant would ever risk taking the stand or going forward with any evidence, for then, if he should be found guilty without any presentation, he could always have a 'new trial' with the omissions supplied."

Moreover, we think one other comment is appropriate in connection with the testimony given by appellant's expert by affidavit on this motion to the effect that the signatures on the three checks were not those of Strauss. Appellant's brief here is strident in terms of "forgery" and "perjury," the alleged forgery being based upon the opinion of the appellant's expert that Strauss's signature was not made by him, and the term perjury being ascribed to some differences in Jack Lowe's testimony on the motion as compared to that given by him on the trial. Appellant, by using these terms, seeks to equate the present record with that in *Mesarosh v. United States*, 352 U.S. 1, in which case the Supreme Court noted that a concession by the Solicitor General that a government witness was dishonest, was sufficient to warrant the grant of a new trial. What the appellant completely ignores here, or overlooks, is that there is no substantial evidence that Strauss's signature, even though not written by him, was a "forgery" in the legal sense. In light of the substantial evidence on the original trial of the transfer of funds in and out of the bank accounts of The Harold Corporation and account in the name of Jeri Bolton, which, according to the evidence, could be drawn against by either or both of the alleged conspirators, the fact that Strauss's name may have been signed by somebody else may well have been with his consent. This would be quite consistent with the fact that as late as March 20, 1957, several months after the three checks are alleged to have been negotiated on a "forged" endorsement in Strauss's name, the parties were still found dividing up the proceeds of a $330,000 loan from the Pan American Bank, and the parties were then signing some releases one

against the other. The jury might have inferred that if these three checks had been endorsed by someone other than Strauss, then it was with his consent or had been ratified by him.

Also, it must be perfectly plain from the present record that no case of "perjury" could be made against Jack Lowe. His testimony, both on the original trial, and on the motion for new trial, is consistent in that he still swears that he made a payment of one sum of $15,000 in cash to Strauss out of certain checks given him by Goodman from The Harold Corporation. The fact that Lowe's recollection seven years after the event as to the exact source of this $15,000 is unclear and may be somewhat inconsistent with his recollection at the time of the trial several years earlier, does not make him guilty of perjury.

Finally, there is nothing in the claim of termination of the association between these parties that is in the nature of newly discovered evidence. This claim was made during counsel's opening statement to the jury. It was sought to be shown on the first motion for new trial. It does not warrant consideration now.

The judgment of the trial court is AFFIRMED.

APPENDIX B

OPINION BELOW

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 19506.

ROBERT L. STRAUSS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Jan. 9, 1963.

Rehearing Denied Feb. 12, 1963.

Before JONES and BELL, Circuit Judges and ESTES, District Judge.

GRIFFIN B. BELL, Circuit Judge.

This appeal is from a judgment of conviction following a jury verdict of guilty on count eight of an indictment for conspiracy to transfer and conceal assets of a corporation in contemplation of a bankruptcy proceeding by or against the corporation with intent to defeat the bankruptcy laws of the United States.[1] The co-conspirator named in the indictment, Goodman, plead guilty. In response to a bill of particulars, the government named the wife of appellant, Luella

[1] 18 U.S.C.A. § 152 in material part provides:

* * * * *

"Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy

H. Strauss, and Geraldine Bolton, also known as Jeri Bolton, as the unnamed persons with whom appellant was alleged to have conspired.

The first seven counts of the indictment, relating solely to Goodman, were substantive in nature and are not here involved. The District Court in a prior proceeding sustained the motion of appellant to dismiss count 8 of the indictment but this court held that the indictment adequately charged conspiracy to transfer and conceal assets in contemplation of bankruptcy, although it failed to state facts sufficient to charge a violation of the mail fraud statute. United States v. Strauss, 5 Cir., 1960, 283 F.2d 155. Count 8 of the indictment in pertinent part and overt acts 6 and 11, the ones here involved, are set out in the margin.[2]

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law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; * * *

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

18 U.S.C.A. § 371 in material part provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2]COUNT EIGHT

"That from on or about January 1, 1956, continuously to about April 18, 1958, within the Southern District of Florida, Raymond L. Goodman, President of the said Harold Corporation, and Robert L. Strauss, in contemplation of a bankruptcy proceeding by or against the said Harold Corporation, and with intent to defeat the bankruptcy laws of the United States, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate, and agree together each with the other and with other persons not herein named as defendants to knowingly and fraudulently transfer and cause to be transferred and conceal and cause to be concealed assets of the said Harold Corporation, * * * *"

* * * * * *

"(6) From on or about November 8, 1957, to on or about March 27, 1958, in the Southern District of Florida, the said Raymond L. Goodman, drew and cause to be drawn 44 checks on the account of

Taking the view most favorable to the government to support the verdict, Glasser v. United States, 1942, 315 U.S. 60, 61 S.Ct. 457, 86 L.Ed. 680, the evidence adduced on the trial by the government was that the Harold Corporation was incorporated under the Florida law in January 1956 and in April 1956 acquired a long term lease on the Cadillac Hotel, Miami Beach, Florida. An addition to the hotel was planned. Appellant and Goodman representing the corporation offered Sam Kay fifteen percent of the amount of the loan, $1,300,000, to obtain a loan within a week with which to build the addition. A loan of $1,250,000 was obtained through Kay from the Miami Beach Federal Savings and Loan Association. Kay, for his services, was assigned a promissory note executed by appellant's wife on August 1, 1956, due ten years after date without interest in the amount of $250,000. Kay also rendered the additional service for appellant and Goodman of preparing the following agreement, Government's Exhibit 9, under date of February 1, 1956. The date is in dispute since Kay testified that he did not meet appellant and Goodman until June 1956. Which date is correct is immaterial under the circumstances of the case but the jury could have believed that the agreement was simply dated February 1, 1956 but executed later. At any rate, it was undisputed that it was executed by appellant, Goodman and Jeri Bolton.

"Miami Beach, Florida, February 1st, 1956.

"This agreement made and entered into this date between Robert L. Strauss and Ray Goodman, hereinafter called the parties of the first part, and Jeri Bolton, hereafter called the party of the second part.

"Whereas, the parties of the first part have been instru-

---

the Harold Corporation in the Miami Beach First National Bank, payable to the order of J. Bolton in amounts totaling $80,225.69."

* * * * *

"(11) On or about November 15, 1956, in the Southern District of Florida, the said Robert L. Strauss received, endorsed and negotiated a certain check dated November 15, 1956, payable to his order and drawn on the Miami Beach First National Bank, Miami Beach, Florida, in the name of the Harold Corporation, in the amount of $45,000.00 in violation of 18 USC, 371."

mental in forming a corporation, known as Harold Corporation, a Florida corporation, and

"Whereas, the parties of the first part are the sole holders of stock in the said corporation, and

"Whereas, it is their intention of selling the said stock for the benefit of the owners of the same, and

"Whereas, they are desirous of making many business transactions regarding both monies and stocks in the Harold Corporation, and

"Whereas, they do not desire their names be used in regard to these transactions, and

"Whereas, the party of the second part, in order to convenience the parties of the first part, is willing to allow the parties of the first part to use her name and bank account for the benefit of the parties of the first part.

"Now, therefore, party of the second part agrees to allow either or both of the parties of the first part to deposit monies in her bank account and does further agree that upon either or both of their requests she will issue checks in her name payable to individuals as requested by either or both of the parties of the first part.

"Parties of the first part agree to accept, buy, sell, and otherwise transfer or hypothecate stock in the Harold Corporation in such a manner as is directed by the parties of the first part.

"The parties of the first part agree to pay to the party of the second part the sum of $500 as compensation for the performance of the covenants contained in paragraphs above by the party of the second part.

"The parties of the first part agree that the party of the second part is in no way connected with the Harold Corporation but is merely accommodating the said parties of the first part and therefore, the parties of the first part agree to save harm-

less the party of the second part for any transactions arising out of the within agreement.

"In witness whereof, parties have set their hand and seals on the date above written.

"(Signed) RAY GOODMAN,
"Party of the first part.

"ROBERT L. STRAUSS,
"Party of the first part.

"JERI BOLTON,
"Party of the second part."

The Harold Corporation obtained various other funds during 1956 and 1957 through the medium of a loan from the Pan-American Bank of Miami, and through the sale of common and preferred stock and debentures to various investors. An involuntary petition in bankruptcy was filed against the corporation on April 18, 1958 and it was adjudicated bankrupt on June 24, 1958.

The accounting testimony was to the effect that the corporation for the fiscal year ending November 30, 1957, suffered a net loss, after capital charges, in the amount of $485,215.22. Of the total of capital charges, $346,844.88 represented depreciation. It had a capital deficit of $393,596.24 and a total deficit of $748,516.24, the total capital being $355,000.

Appellant offered a balance sheet dated January 31, 1957. It showed the same capital but a surplus of $156,155.29 making total capital of $511,155.29 but this statement did not include depreciation. The fixed assets on this statement were based on appraised value, $3,750,000, but at cost on the November 30 statement, $3,453,864.07 less depreciation in the amount of $435,907.38. Using the November 30 net fixed asset figure, there was a deficit in capital as of January 31, 1957 of $220,888.02. Thus there was a diminishment in the capital figure—really corporate assets as there was no capital left-over the next nine months of $172,708.22.

The government relied on the agreement, its Exhibit 9, between appellant, Goodman and Bolton, and on the fact that large sums of money were transferred from the funds of the corporation to the

account of Bolton, and to Goodman and appellant. The total amount of the checks introduced in the evidence drawn on the Harold Corporation payable to appellant or from which he allegedly received the proceeds was $122,275. One was in the amount of $45,000. The company constructing the addition to the hotel drew $45,000 from the construction account and transferred it to the Harold Corporation. On the same day the corporation transferred the same amount to appellant by check drawn by Goodman. This check bore the purported endorsement of appellant.

Lowe, at one time president of the Harold Corporation, testified regarding a series of checks made payable to Jeri Bolton by the corporation which he personally cashed and gave the proceeds either to Goodman or appellant. The proceeds of one check in the amount of $15,000 was given to appellant outside the bank. Lowe testified that on one occasion he obtained cash on one of the checks made payable to Jeri Bolton and delivered the proceeds to Goodman at the home of the latter where there was an exchange of funds on the front porch with appellant. On another occasion, out of the proceeds of the Pan-American Bank loan to the Harold Corporation, $111,000 was paid to Florida International Corporation, a corporation of which appellant was an officer with the power to write checks. The cashier of the Pan-American Bank testified that checks drawn by appellant on that bank on the account of the Harold Corporation payable either to himself or to cash and purporting to bear his endorsement totaled $54,000. There was evidence that Jeri Bolton drew checks on the account of the Harold Corporation in the Mercantile Bank of Miami in the amount of $16,000 and $7,500 payable to appellant, and these were purportedly endorsed by him. There was another check drawn on the Harold Corporation account in the Miami Beach First National Bank to appellant, purportedly endorsed by appellant and Goodman, in the amount of $25,500. There was also evidence of checks representing funds of the corporation being made payable to Luella H. Strauss, wife of appellant.

Geraldine Zumwalt, formerly Geraldine or Jeri Bolton, identified her signature on the signature card of the Mercantile Bank but testified that she did not know that she had an account there and she knew nothing about the ledger card for her account, and did not recall ever having made a deposit in the bank. She was not positive

that the endorsements on the Harold Corporation checks made payable to her were made by her.

The signature of appellant on the agreement with Goodman and Bolton was admitted, and an examiner of questioned documents testified that the signature on it and the check drawn on the Harold Corporation by appellant payable to Florida International for $111,000 and the endorsements on certain of the other checks of the Harold Corporation payable to appellant, purporting to be the signature of appellant, were all made by the same person.

There was no evidence refuting any inference that these funds were transferred improperly to appellant. The basis of the defense was that the burden was on the government to show the impropriety, and that it was just as reasonable to hypothesize propriety as impropriety on the theory that these funds could have been paid to appellant for any number of legitimate reasons such as in satisfaction of loans made, or for salary, or as fees for services rendered. There was no evidence whatever to back up this theory.

Appellant filed a motion just prior to trial asking that the court prescribe the order of proof. This was designed to require the government to prove that appellant was a party to the alleged conspiracy between November 1, 1957 and April 18, 1958 before it proved acts done pursuant to the conspiracy. The denial of this motion is assigned as error, and the fallacy in the assignment is two-fold. First, the order of proof in a conspiracy case is left to the discretion of the trial court. Putnam v. United States, 1896, 162 U.S. 687, 16 S.Ct. 923, 40 L.Ed. 1118; Thiede v. Utah, 1895, 159 U.S. 510, 16 S.Ct. 62, 40 L.Ed. 237; McDaniel v. United States, 5 Cir., 1928, 24 F.2d 303. Cf. Landers v. United States, 5 Cir., 1962, 304 F.2d 577; United States v. Pugliese, 2 Cir., 1945, 153 F.2d 497. More often than not the clandestine nature of a conspiracy is such that proof, necessarily circumstantial, requires a number of items of evidence before an inference of the conspiracy can be fairly drawn. The grant of such a motion in a run-of-mine conspiracy case such as this would hamstring the prosecution to the extent of making it virtually impossible to prove what in fact was a conspiracy. There is no warrant in law for such a proposition. There was no abuse of discretion in the denial of the motion.

Second, the indictment alleges a conspiracy from on or about January 1, 1956 continuously to about April 15, 1958, and appellant cannot narrow the period of the conspiracy, as he attempted to do, by relating this count to substantive counts 6 and 7 against Goodman. The period of the conspiracy was a matter for trial and for proof and the burden was on appellant to show his disassociation from the conspiracy, once he had been connected, as he was, to it. Marbs v. United States, 8 Cir., 1957, 250 F.2d 514, cert. den., 356 U.S. 919, 78 S.Ct. 703, 2 L.Ed.2d 715; United States v. Markman, 2 Cir., 1952, 193 F.2d 574, cert. den., Livolsi v. United States, 343 U.S. 979, 72 S.Ct. 1079, 96 L.Ed. 1371 and United States v. Cohen, 2 Cir., 1944, 145 F.2d 82, cert. den., 323 U.S. 799, 65 S.Ct. 553, 89 L.Ed. 637. There is no substance to this assignment of error.

The heart of this appeal lies in the contention that the trial court erred in denying motions for acquittal, and to strike evidence which had been admitted subject to proof of the conspiracy, and which if stricken, would have rendered the case for the government insufficient. The trial court, in a carefully and patiently conducted semi-protracted trial held the government strictly to its burden. The agreement between Goodman, appellant and Bolton was relied on by the government as the basic component or central part in the conspiracy. Thereafter, in the main, all of the documentary evidence in any way relevant to the conspiracy, such as documents representing the various financial transactions between the Harold Corporation and the alleged conspirators, was admitted subject to a motion to strike if relevancy was not shown. The government took the position that the conspiracy was being made out by the introduction of the various pieces of evidence and that by the end of its case all of the pieces would fall in place and make out the conspiracy. It was against this background, and when the government rested, that the court denied the motion to strike the evidence, and the motion for acquittal. A motion for acquittal at the close of the case was also denied.

This was a circumstantial evidence case from the standpoint of proof of the conspiracy, and as such must be reviewed in the light of the rule that the circumstantial evidence must be not only consistent with the guilt of the accused, but also inconsistent with every reasonable hypotheses of his innocence. Curtis v. United States, 5 Cir., 1961, 297 F.2d 639, and Riggs v. United States, 5 Cir., 1960, 280 F.2d

949. This rule must be applied to a motion for judgment of acquittal and our review of it. But it is not whether in our opinion the evidence fails to exclude every hypotheses other than guilt but rather whether there was evidence from which the jury might reasonably so conclude. We said in Vick v. United States, 5 Cir., 1954, 216 F.2d 228, 232:

> "In such cases the test to be applied on motion for judgment of acquittal and on review of the denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude."

We hold that the jury might reasonably so conclude. The agreement between appellant, Goodman and Bolton, the withdrawal of the various funds at a time when the corporation was in shaky financial condition, the lack of any explanation whatever for the withdrawals and the fact that the withdrawals, for aught that appears, went to appellant or to a corporation in which he had an interest, constituted a sufficient fact basis from which an inference of guilty beyond a reasonable doubt could be drawn, while at the same time the jury might reasonably had concluded that the evidence excluded every other reasonable hypothesis save that of guilt.

We find no error in the rulings of the trial court concerning identification of the signature of appellant on the specified exhibits. In each instance the exhibits were admitted as records kept in the usual course of business by a bank under 28 U.S.C.A. § 1732, but the objection runs to the claimed want of proof of the signature. It is elementary, putting aside the expert testimony of genuineness of the signatures, that the jury was entitled to draw their own conclusion as to the genuineness of the signature on the various exhibits by a comparison with the admitted signature of appellant on Government Exhibit 9, the agreement between Goodman, appellant and Bolton. 28 U.S.C.A. § 1731; Hickory v. United States, 1894, 151 U.S. 303, 306, 14 S.Ct. 334, 38 L.Ed. 170; French v. United States, 5 Cir., 1956, 232 F.2d 736; Desimone v. United States, 9 Cir., 1955, 227 F.2d 864; Goins v. United States, 4 Cir., 1938, 99 F.2d 147 and In Re Goldberg, 2 Cir., 1937, 91 F.2d 996.

Nor did the court err in reading overt act number six to the

jury. The jury was instructed that the indictment was not evidence and that it was not to be considered as evidence of any kind against appellant. This overt act alleged that Goodman drew and caused to be drawn checks on the account of the Harold Corporation in the Miami Beach First National Bank payable to the order of Jeri Bolton in amounts totaling $80,225.69 between November 8, 1957 and March 27, 1958. The proof in this connection was eleven checks between June 3 and August 29, 1957 payable to the order of Jeri Bolton in amounts totaling $86,879.91. We do not believe that this variance in proof under the circumstances prejudiced appellant. Ledbetter v. United States, 1898, 170 U.S. 606; 18 S.Ct. 774, 42 L.Ed. 1162; Hale v. United States, 5 Cir., 1945, 149 F.2d 401, cert. den., 326 U.S. 732, 66 S.Ct. 40, 90 L.Ed. 436. Substantial similarity between the facts alleged in the overt act and those proved is all that is required. See Berger v. United States, 1935, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314; and United States v. Tramaglino, 2 Cir., 1952, 197 F.2d 928.

The last assignment of error rests on the mandatory nature of the Court Reporters Act, 28 U.S.C.A. § 753 (b)(1), which requires that all proceedings in criminal cases had in open court be recorded verbatim. Appellant points out that on fifteen occasions during the trial conferences were held between the court and counsel out of the hearing of the jury and these were not reported. This contention, not called to the attention of the trial court in the motion for new trial, is based on the assertion that the conferences were not informal discussions concerning routine matters of procedure but were, for the most part, arguments concerning the irrelevency of various testimony and exhibits submitted by the government. It is also alleged that the court reporter did not record the examination of the veniremen. It is the position of appellant that there may or may not have been error in the examination of the veniremen but that it is too late to discover such error as there might have been because there is no transcript of the proceedings. He states that the error of the trial court "in admitting various pieces of evidence" would be apparent from the statements of the court and counsel made during the fifteen unrecorded conferences, and that a record of these conferences would have revealed the conditions upon which the evidence was admitted and the representations of the government

as to how the evidence would be subsequently connected up. Appellant, because the conferences were not recorded, states that he is unable to present argument as to any error of the trial court which would otherwise be apparent, and that a supplemental record cannot cure this defect since an attempt to reconstruct such a large number of complicated arguments would be futile.

Without passing on the question of whether a conference between the court and counsel in the courtroom, but without the hearing of the jury, is in open court, as open court is used in the statute, we find no merit in this assignment of error. No effort has been made to reconstruct the substance of these conferences for submission on supplemental record. Furthermore, no specific error or prejudice resulting therefrom is called to our attention. This is the very least that would be required under Stephens v. United States, 5 Cir., 1961, 289 F.2d 308, where errors were specified, and where there was no record on which to test the claimed errors. To permit an appelant simply to claim error for failure to record under the Act, without more, would eliminate the necessity of a showing of prejudice because of the error. The error may well have been harmless when considered in the light of the facts which were reported. The footnote in our case of Stansbury v. United States, 5 Cir., 1955, 219 F.2d 165 to the effect that conferences outside the hearing of the jury may not be proper unless reported is relied on by appellant. This indefinite statement was wholly unnecessary to the decision reached. The substance of what transpired in the unreported conference was before the court on a reconstructed supplemental record. While we may well agree with the statement that the better practice would be for trial judges to call the reporter to the bench to record conferences between court and counsel, the determination of whether failure to do so constitutes error must await a case giving rise to the question. We have never held that a failure to comply with the Court Reporter Act is error per se. See Fowler v. United States, 5 Cir., 1962, 310 F.2d 66; and United States v. Taylor, 4 Cir., 1962, 303 F.2d 165. We do not do so now and that in substance is the question before us.

Appellant was duly and fairly tried. The verdict rested on a sufficient evidentiary foundation. No prejudicial error has been shown. The judgment of conviction should be and is

Affirmed.

APPENDIX C

OPINION BELOW

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 20752

ROBERT L. STRAUSS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appelle.

(Nov. 4, 1964.)

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

PER CURIAM:

This is an appeal from the denial by the trial court of a motion for new trial on the ground of newly discovered evidence. We are unable to hold that the trial court erred in light of the strict requirements for the granting of such extraordinary motions. See Ledet v. United States, 5 Cir., 297 F.2d 737, and Newman v. United States, 5 Cir., 238 F.2d 861.

The judgment is affirmed.

APPENDIX D

JUDGMENT OF AFFIRMANCE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22897

D. C. Docket No. Cr. 11,330 M-GCY

ROBERT L. STRAUSS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, BROWN and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 21, 1966

Issued as Mandate:

APPENDIX E

JUDGMENT OF AFFIRMANCE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22,897

ROBERT L. STRAUSS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(September 22, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX F

STATUTES AND RULES INVOLVED

Title 18, U.S.C. §152:

§ *152. Concealment of assets; false oaths and claims; bribery*

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly

and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. As amended June 12, 1960, Pub.L. 86-519, § 2, 74 Stat. 217; Sept. 2, 1960, Pub.L. 86-701, 74 Stat. 753.

Title 18, U.S.C. §371:

§ *371. Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C., §1341

§ *1341. Frauds and swindles*

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. As amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

Rule 33, Federal Rules of Criminal Procedure.

Rule 33.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three copies of the within Petition for Certiorari were mailed, air mail, with sufficient postage prepaid to the Honorable THURGOOD MARSHALL, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and that three additional copies were mailed, with sufficient postage prepaid to the Honorable WILLIAM A. MEADOWS, JR., United States Attorney, Main Post Office Building, Miami, Florida 33101, this ____ day of October, 1966.

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238-775—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 713

ROBERT L. STRAUSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 363 F. 2d 366 (Pet. App. 1–5). The opinion of the court of appeals, affirming the original conviction is reported at 311 F. 2d 926 (Pet. App. 6–16). Certiorari was denied, 373 U.S. 910. The per curiam opinion of the court of appeals affirming denial of an earlier motion for a new trial on the basis of newly discovered evidence is reported at 337 F. 2d 853 (Pet. App. 17).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1966. A petition for rehearing was denied on September 22, 1966. The petition for a writ of certiorari was filed on October 21, 1966. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court properly denied petitioner's second motion for a new trial based on allegedly newly discovered evidence.

STATUTES AND RULE INVOLVED

18 U.S.C. (1958 ed.) 152, at the time of the events here involved, provided pertinently:

> Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 371 provides pertinently:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 33, F.R. Crim. P., prior to July 1, 1966, provided as follows:

> The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new

judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.[1]

STATEMENT

Petitioner seeks review of the denial of his second motion for a new trial based on newly discovered evidence, which denial was upheld by the Fifth Circuit on appeal. Petitioner was convicted on an indictment in the United States District Court for the Southern District of Florida alleging that he and co-defendant Goodman, in contemplation of the bankruptcy of a corporation of which they were officers, conspired to transfer and conceal assets of that corporation in violation of 18 U.S.C. 152, 371 (Supp. R. 13–18).[2] Goodman pleaded guilty (Pet. App. 6). On February 2, 1962, after a jury trial, petitioner was given a sentence of two years, four months in prison and the balance on probation (Supp. R. 37–38). The conviction was affirmed. *Strauss* v. *United States*, 311 F. 2d 926, certiorari denied, 373 U.S. 910.

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[1] Rule 33, as revised slightly, effective July 1, 1966, is set out in the petition (Pet. App. 22).

[2] Following the same designation as in the petition, "R." refers to the record in the present proceeding, and "Supp. R." to the record at trial. We have also lodged with the Court the record of the proceeding on the first motion for new trial based on newly discovered evidence, which is referred to herein as "2d Supp. R."

1. The evidence on which petitioner was convicted is summarized in the opinion written by the court of appeals in affirming the conviction (Pet. App. 6–14). In brief, it showed that in 1956 petitioner and Goodman, stating that they were sole stockholders of Harold Corporation, entered into a written agreement dated February 1, 1956, with one Jeri Bolton by which she agreed that, for a consideration, she would allow her name to be used in corporate transactions. The corporation acquired a long-term lease on the Cadillac Hotel at Miami Beach and plans were made for doubling its size (Supp. R. 207, 480). Harold Corporation acquired funds from a Miami bank through a construction loan totaling $1,250,000 and from other sources in 1956 and 1957. It was adjudicated a bankrupt in June 1958.[3]

The government's evidence showed a number of transactions by which money was withdrawn from the corporation without any apparent consideration. Some of these implicated petitioner directly.[4] Jack

[3] Incident to obtaining the loan, the corporation submitted a copy of the construction contract, which called for payment of the $1,250,000 to Cal Kovens Construction Company, to cover the entire costs of the job (Supp. R. 82–92). The day after the loan was closed, this agreement was superseded by one in which the construction company agreed to supervise the work for a total fee of $50,000, while the corporation assumed the payment of all building costs directly (Supp. R. 93–96).

[4] On November 15, 1956, the Kovens Company drew $45,000 on the special construction account set up by the lending savings and loan company (Supp. R. 96–98), and paid the same amount to Harold Corporation, which paid the same amount to petitioner, all on the same day (Supp. R. 384, 401, 405, 423–424). The check payable to petitioner bore the endorsement "Robert L.

Low, a former manager of the Cadillac Hotel and president of Harold Corporation, testified that he was directed to cash company checks payable to Miss Bolton and give the proceeds either to Goodman, to petitioner, or to wire them to the Rhodes Optical

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Strauss", which a handwriting expert testified at trial was executed by petitioner (Supp. R. 401, 405, 466–467; Govt. Exh. 52).

Photocopies were introduced of the following checks drawn on Harold Corporation's account with the Pan American Bank by Robert L. Strauss, payable either to himself or to cash and purporting to bear petitioner's signature both as drawer and endorsee (Supp. R. 271–277):

July 25, 1956 (Govt. Exh. 24)	$17,500
Sept. 28, 1956 (part of Govt. Exh. 25)	4,000
Oct. 1, 1956 (part of Govt. Exh. 25)	6,000
Oct. 1, 1956 (part of Govt. Exh. 25)	4,000
Oct. 17, 1956 (part of Govt. Exh. 26)	1,400
Nov. 1, 1956 (part of Govt. Exh. 26)	1,700
Nov. 9, 1956 (part of Govt. Exh. 26)	8,425
July 31, 1956 (Govt. Exh. 27)	11,250

Photocopies were introduced of two checks purportedly drawn by Jeri Bolton on the Mercantile National Bank, payable to Robert L. Strauss and endorsed "Robert L. Strauss" (Supp. R. 315–319):

Dec. 10, 1956 (Govt. Exh. 34)	$16,000
Dec. 19, 1956 (Govt. Exh. 35)	7,500

Also introduced was a photocopy of a check of the corporation drawn on the Miami Beach First National Bank, payable to Robert L. Strauss and Ray Goodman, dated October 11, 1956, in the amount of $25,500 (Supp. R. 401–405; Govt. Exh. 51). The endorsement of petitioner thereon was genuine in the opinion of the government's handwriting expert (Supp. R. 466–467).

The Pan American Bank made a loan of $330,000 to the corporation on March 20, 1957, which was paid out by the corporation on the same day (Supp. R. 266–270). Included in the payments was a check for $111,000, drawn by petitioner, to Florida International Corporation, a company of which petitioner was treasurer (Supp. R. 158, 529, Govt. Exh. 51).

Company in Atlanta. He could not identify these occasions with any particular checks (Supp. R. 213, 216, 218, 220, 225).

On cross-examination, Low reiterated that he could not remember the disposition made of any particular checks. He testified (Supp. R. 231):

> I remember on one occasion Mr. Strauss met me at the corner of the bank waiting for me to cash a check. It was a $15,000 or above; I remember that.

However, he could not tie this transaction to any check (Supp. R. 231). On another occasion he took a sum of money to Goodman's house and there was an exchange of funds with petitioner on the porch (Supp. R. 238).

2. In this second motion for a new trial,[5] petitioner sought to prove: (a) That the testimony of Jack Low that he had cashed checks involving company funds and given the proceeds to petitioner was perjured; (b) that petitioner's purported endorsements on three checks were forgeries;[6] and (c) that petitioner severed his relation with Harold Corporation on March 20, 1957.

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[5] In a prior motion, petitioner had sought a new trial on the basis of testimony of co-defendant Goodman before the bankruptcy court that petitioner and his wife sold all their stock and petitioner terminated all his participation in Harold Corporation on March 14, 1957 (2d Supp. R. 2–10).

[6] The checks were:

Govt. Exh. 51, a company check on the Miami Beach First National Bank, dated October 11, 1956, for $25,500, payable to Robert Strauss and Ray Goodman (note 4, *supra*).

Govt. Exh. 34, a check by Jeri Bolton on the Mercantile National Bank, dated December 10, 1956, for $16,000, payable to petitioner (note 4, *supra*).

Govt. Exh. 35, a check by Jeri Bolton on the Mercantile National Bank, dated December 19, 1956, for $7,500, payable to petitioner (note 4, *supra*).

(a) Low was called by petitioner and questioned about the occasion when he had delivered money to petitioner outside the bank. Several pages of his 1962 testimony were read to him and he was then asked (R. 9):

> Q. Now, I believe you stated that the funds from this particular check you say today, was given to Mr. Strauss, is that correct?[7]
>
> A. To the best of my memory, this is the check in which the funds were given to Mr. Strauss, yes.

Further cross-examined as to this occurrence, Low stated that he could not connect it with any particular check. He admitted that a deposit slip to the Bolton account in the Mercantile National Bank, dated August 27, 1957, for $15,000 was in his handwriting and indicated the possibility or likelihood that he himself had deposited the proceeds of the check in the Bolton account. He testified similarly to a check for $21,000 payable to Jeri Bolton, dated August 29, 1957, and another deposit slip in this amount for the latter date (R. 19–22).[8]

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[7] The check referred to was Govt. Exh. 15 at trial, a company check to Jeri Bolton, dated August 27, 1957, for $15,000. Low had not stated at any time, as asserted in the question, that the funds from this particular check had been paid to petitioner, but had always testified that he could only state that a "pattern" was followed, in which he would cash a check and deliver the proceeds as directed to one of three places. See *supra*, 5–6.

[8] Low did not, as petitioner asserts (Pet. 9), change his story after being confronted with the deposit slips. He had already testified, consistent with his testimony at the 1962 trial: "[T]here were a series of many, many checks" (R. 10); "The proceeds followed again, as I said before, a certain pattern. The exact proceeds of any one check I cannot tell you truthfully, but I

A certified public accountant testified that he had audited the books of Harold Corporation. In the first nine months of 1957 thirteen checks in the amount of $15,000 or above were issued. Only two were cashed, the foregoing checks to Jeri Bolton in the amounts of $15,000 and $21,000 (R. 36–38). Petitioner testified that Low at no time delivered $15,000 or any other sum of money to him. He stated that he was in Colombia the biggest portion of 1957, but that he could not be specific about dates (R. 101–102). A tourist card issued to petitioner and the certification of an official, based on the tourist card, that petitioner was in Colombia from August 18 to September 3, 1957, were exhibited to the court (R. 141–148).

(b) A handwriting expert testified on behalf of petitioner with respect to the purported endorsement by petitioner on Defendant's Exhibit 11 (Govt. Exh. 51 at trial), an enlargement of a microfilm of a company check dated October 11, 1956, payable to peti-

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can tell you the pattern" (R. 12); "I gave it, whether for this check or any check, I gave Mr. Strauss $15,000. I don't remember which check—* * * I said it possibly could have been this check. * * *. There were many checks and I don't recall which one it is, as it was seven or eight years ago. * * * To the best of my memory, it was in late August * * * '57. It was just about the time these checks were produced or in existence. There were many, many ramifications and there were deposits made, money withdrawn, checks cashed, and as I started to explain, you were reading the pattern of things—money was taken to the Western Union, taken and mailed to Rhodes Optical; and other monies were given back to him, and other monies he gave to his wife or to Mr. Strauss. There were a number of checks, or a series of checks, there were diversion of this constant routine" (R. 12–14). He also stated: "[I]t had to be at least a sum of more than two checks if there wasn't one, because I gave him the $15,000" (R. 18).

tioner, in the amount of $25,500 (notes 4, 6, *supra*). His initial answer was somewhat equivocal.[9] He later said that he did not consider the endorsement genuine because of irregularities in the lines caused by the pen of the writer moving slowly, inadvertent motion habits of the writer differing from those of petitioner, and differences in the designs of letters (R. 52–54).[10] For similar reasons he was of the opinion that the endorsements "Robert L. Strauss" on Government Exhibits 34 and 35, checks drawn by Jeri Bolton to petitioner, dated December 10 and 19, 1956, in the respective amounts of $16,000 and $7,500 (note 6, *supra*) were also not made by petitioner (R. 63–71).

(c) Petitioner alleged in his present motion for a new trial (R. 126):

> Recently, the defendant, while examining records to be used in connection with the defense of the income tax case aforementioned, found a certain document entitled "Release" which conclusively proves the defendant's separation from the affairs of the Harold Corporation after March 20, 1957. The defendant did

[9] Petitioner's expert's first answer was: "I found the questioned signature, Robert Strauss of the endorsement, Defendant's Exhibit No. 11, to have a resemblance in design to the example signatures, Government's Exhibit No. 1, 30–L and 30–M beyond what anyone who was not this Robert Strauss, but also had the name Robert Strauss, would cause a resemblance to be created, so that the signature on Government's Exhibit No. 11, Defendant's Exhibit No. 11, must be either genuine and written by Robert Strauss, the writer of the examples, or it must be an imitation" (R. 52).

[10] On the first motion for new trial hearing, Goodman, called by petitioner, testified that petitioner's endorsement on the check was genuine and that petitioner received the proceeds thereof (2d Supp. R. 70–72).

not recall the existence of the document until recently found, a copy of said document is attached hereto marked Exhibit "C" and made a part hereof.

This document, dated March 20, 1957, and signed by Jeri Bolton and Ray Goodman, released petitioner from all claims arising out of the tripartite agreement of petitioner, Goodman and Bolton, dated February 1, 1956.[11] At the hearing, petitioner testified that he started negotiating with Goodman in regard to Harold Corporation in late March 1956, that he was originally released from the corporation March 4 or 5, 1957, rejoined the company so that he could properly execute a mortgage to the Pan American Bank on March 14, 1957, then finally got out on March 20, 1957 (R. 100, 108). Defendant's Exhibit 8 is a release from the tripartite agreement and Defendant's Exhibit 9 is a release by Harold Corporation, both dated March 20, 1957 (R. 106).

ARGUMENT

Under the circumstances here, petitioner is plainly not entitled to a new trial on the basis of the proffered evidence. The district court did not abuse its discretion in denying petitioner's motion, the decisions below were therefore correct, and there is no occasion for review by this Court.

(a) The "newly discovered evidence" does not show perjury on the part of the witness Low. This witness testified at trial on direct examination that on a number of occasions he had cashed checks involving

[11] This agreement is set out in full in the Fifth Circuit's first opinion; see Pet. App. 8–10.

company funds and had given the proceeds either to Goodman or to petitioner, or sent them to a company in Atlanta, but that he could not connect these transactions with any particular checks. On cross-examination he recalled two specific occasions, one where petitioner followed him to the bank and received $15,000, or more; the proceeds of one or more checks. When called by petitioner as a witness on this motion and told that he had identified this transaction with a particular check for $15,000 cashed on August 27, 1957 (although there was no factual basis for this assertion), Low accepted it as true. However, he promptly corrected himself and reasserted his trial testimony a number of times before he was shown a deposit slip which indicated the $15,000 check was deposited to the Jeri Bolton account (*supra*, p. 7). Confusion thus induced as to details grown indistinct through the passage of years patently does not constitute perjury. Nor do we read the testimony of the accountant, called by petitioner, as excluding the possibility of the occurrence as originally testified to. In any event, evidence which is merely cumulative or impeaching is an insufficient basis for the granting of a new trial. *Mesarosh* v. *United States*, 352 U.S. 1, 9; *Ledet* v. *United States*, 297 F. 2d 737, 739 (C.A. 5).[12]

[12] Petitioner's reliance on *Mesarosh*, *supra*, is misplaced. Indeed, in the Court's opinion in that case it is expressly stated:

> It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an alle-

2. At trial petitioner offered no expert testimony to contest the genuineness of his signatures to the many incriminating checks introduced by the government. On the motion as originally filed, the validity of one of these endorsements was contested; by an amendment, two additional endorsements were questioned. The proper time for petitioner to have denied the execution of these endorsements by expert opinion testimony, or otherwise, was at trial. At best, this new evidence was impeaching in nature, and, as noted by the court below (Pet. App. 4–5), did not necessarily show that any "forgery" had occurred.

3. The newly discovered release by Jeri Bolton and Ray Goodman, which was attached to petitioner's new trial motion, is meaningless on its face. Bolton, by the admittedly genuine tripartite agreement, was a mere straw figure to front for petitioner and Goodman in activities in which they did not want their names to appear. At the hearing an additional and even more newly discovered release was presented which was purportedly executed by the corporation on the same date. There was substantial evidence at trial that petitioner did not terminate his relationship with the company at any of the dates mentioned at one time or another by petitioner or upon any other date. No evidence of such termination was presented. Moreover, even if petitioner had withdrawn from the corporation in March 1957, there was ample evidence

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gation by the defense ordinarily will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial (352 U.S. at 9).

to support his conviction on the basis of transfers and concealment prior to that time. The offense here charged could occur even before the corporation was formed. *Kaplan* v. *United States*, 7 F. 2d 594, 596 (C.A. 2), certiorari denied, 269 U.S. 582. Cf. *United States* v. *Rabinowich*, 238 U.S. 78, 85–86; *Alkon* v. *United States*, 163 Fed. 810 (C.A. 1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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